Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976

No. 76-83

G.E.M. CORPORATION, d.b.a.
GENE THOMAS CASCADE LOUNGE,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF THE
STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio

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Supreme Court of the United States

October Term, 1976

No. .....

G.E.M. CORPORATION, d.b.a.
GENE THOMAS CASCADE LOUNGE,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF THE
STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, G.E.M. Corporation, d.b.a. Gene Thomas Cascade Lounge, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio, which judgment became final on April 23, 1976, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Order of the Liquor Control Commission of the State of Ohio, which is unreported, is set forth in the Appendix herein.

The Finding and Judgment of the Summit County Court of Common Pleas, unreported, is set forth in the Appendix herein.

The Supplemental Finding and Judgment of the Summit County Court of Common Pleas, unreported, is set forth in the Appendix herein.

The Decision and Journal Entry of the Court of Appeals for the Seventh Appellate Judicial District of the State of Ohio, unreported, is set forth in the Appendix herein.

The Judgment of the Supreme Court of Ohio, dismissing the appeal, unreported, is set forth in the Appendix herein.

The Judgment of the Supreme Court of Ohio overruling the motion to certify, unreported, is set forth in the Appendix herein.

The Order of the Supreme Court of Ohio denying rehearing, unreported, is set forth in the Appendix herein.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio was entered on December 6, 1975. The Supreme Court of Ohio overruled petitioner's Motion to Certify the record on March 12, 1976. The Order of the Supreme Court of Ohio denying

petitioner's Motion for Rehearing was made and entered on April 23, 1976.

The jurisdiction of the Court is invoked pursuant to Title 28, U.S.C. Section 1257(3).

QUESTION PRESENTED

1. May a state agency disregard State mandated procedure and deprive an entity of its liquor license in such a manner as to be arbitrary, unreasonable, capricious and discriminatory, violating traditional due process guaranties?

CONSTITUTIONAL PROVISIONS, STATE STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment XIV, Sec 1:

> . . . nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Ohio Revised Code Section 119.12—Appeal by Party Adversely Affected:

> Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant an issuance or renewal of a license, registration of a licensee, or revoking or suspending a license, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, . . .

. . . The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to such action . . .

The Court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate or modify the order or make such other ruling as is supported by reliable, probative and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated or modified on appeal.

Ohio Revised Code Section 4301.04—Powers of Commission:

The liquor control commission has the following powers which it may exercise by the vote of a majority of the commissioners:

(A) To suspend, revoke and cancel permits . . .

(G) For the purpose of any hearing or investigation which they are respectively authorized or required by such chapters to conduct, the liquor control commission or any member thereof, the director, or any agent of the department designated in writing for that purpose, may administer oaths, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony . . .

Liquor Control Commission Regulation 1-65—Procedure for Hearing Before the Liquor Control Commission:

SECTION IV: In all hearings before the Commission and the determination thereof, the production of evidence shall be governed in general by the rules of evidence and burden of proof required by Ohio Courts in civil cases. The Director, the appellant or the permit holder may be represented by counsel at such hearing and such hearing shall be conducted with respect to the administration of oaths, the taking of depositions, issuing subpoenas, and the compulsory attendance of witnesses and the production of books, accounts, papers, records, documents and testimony all in accordance with Section 4301.04, Revised Code of Ohio.

SECTION V: In all hearings before the Commission the burden of proof in all cases shall rest upon the Director of the Department. . . .

STATEMENT OF THE CASE

The petitioner, G.E.M. Corporation, d.b.a. Gene Thomas Cascade Lounge, duly organized and doing business under the laws of the State of Ohio, was issued a Class D-5 and a Class D-6 liquor permit by the Ohio Department of Liquor Control on March 22, 1972, for the premises at 23 South Main Street, Akron, Ohio. This permit was granted pursuant to an application for transfer from the former permit holder, doing business as Eli's Lounge, to the petitioner, G.E.M. Corporation. At that time, no objection was made by any state or local authority as to petitioner's transfer of said permits.

On October 13, 1972, petitioner received notice that the Director of the Ohio Department of Liquor Control had issued an order denying the petitioner's renewal application for the year 1972. On October 27, 1972, the petitioner filed an appeal from the order of the Department of Liquor Control with the Liquor Control Commission of the State of Ohio. A hearing was then held before the Commission on January 17, 1973, at which hearing only two of the three members of the Commission were present, Mr. Fred Krumholtz not being present at any time during this hearing. Moreover, there is no evidence that member Krumholtz ever received the transcript of the January 17, 1973 hearing.

The resulting order dismissing the appeal in which the Commission found that the petitioner showed a manifest disregard for law and order and was not a proper person to hold a permit, was dated January 17, 1973 (See Appendix p. A21).

Member Krumholtz's signature was affixed by rubber stamp to the carbon copy of the order that petitioner received. In this order, the petitioner was notified that the appeal from the order of the Department of Liquor Control was dismissed, Chairman Thomas voting for dismissal and the vote of the absent member, Mr. Krumholtz, constituting the deciding vote for such dismissal. Vice-Chairman Tablack, a member of the Commission who was in attendance, dissented, voting to reverse the Director of the Department of Liquor Control's decision.

Pursuant to the statutory scheme set forth in Ohio Revised Code Section 119.12, the petitioner appealed the constitutionality of the proceedings before the Liquor Control Commission to the Common Pleas Court of Summit County, Ohio. That Court upheld the order of the Liquor Control Commission (See Appendix p. A13).

On appeal, the Court of Appeals for the Ninth Appellate Judicial District of the State of Ohio, for reasons more fully explained in its Opinion, once again affirmed the order of the Liquor Control Commission (See Appendix p. A4).

The petitioner then appealed said judgment of the Court of Appeals to the Supreme Court of the State of Ohio which declined to accept jurisdiction and review the Court of Appeals' decision. On April 23, 1976, petitioner's timely filed motion for rehearing was denied by said Court.

The petitioner seeks to have this Court review the Court of Appeals' decision with respect to the constitutionality of the proceedings before the Liquor Control Commission of the State of Ohio.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS OF THE STATE OF OHIO ERRED IN AFFIRMING THE ORDER OF THE OHIO LIQUOR CONTROL COMMISSION SINCE THAT ORDER WAS ISSUED IN THE ABSENCE OF A REVIEW OF THE CERTIFIED TESTIMONY BY ONE OF THE THREE COMMISSIONERS.

Ohio Revised Code Section 119.12 sets out the standard for review of the decision of a state agency denying an applicant the renewal of its license.

> The Court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and *is in accordance with law.* (Emphasis added.)

The January 17, 1973 hearing before the Ohio Liquor Control Commission was held before only two of the three Commission members, Chairman Kenneth E. Thomas and Mr. George Tablack. The petitioner alleges that the third and absent member of the Commission, Mr. Fred Krumholtz, never reviewed the certified written transcript of the hearing, despite the fact that his vote affirmed the Director of the Department of Liquor Control's decision. This is evident by the fact that the order of the Commission certified to the Court of Common Pleas, to which was affixed Mr. Krumholtz's signature by rubber stamp, was dated January 17, 1973, the date of the hearing, despite the fact that there was a voluminous amount of testimony and evidence taken at said hearing which Mr. Krumholtz would have had to review before making his decision. Furthermore, the certified copy of the transcribed record was not placed in the possession of the Clerk of the Common Pleas Court until February 27, 1973, despite repeated earlier requests for the delivery of this record.

Petitioner stipulates that Ohio Revised Code Section 4301.04(G) allows even one member of the Commission to take testimony at such a hearing, but Ohio Revised Code Section 119.12, as interpreted by 1963 Ohio Attorney General Opinion 200 at p. 294, requires that such member or members ". . . must cause a record to be made of such evidence for review by the board as a whole".

Since there appears to be no warranty and little possibility that Mr. Krumholtz's vote was based on a full review of the complete certified record, the order of the Commission was not rendered in accordance with law, as required for an affirmance of such by Ohio Revised Code Section 119.12.

Additionally, the requirements of the Fourteenth Amendment due process clause are only satisfied if the

trial is in accordance with the settled course of judicial proceedings and the individual is not subjected to the deprivation of its property in an arbitrary or capricious manner. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

Neither the state nor any of its agencies can disregard these constitutional prohibitions. *Buchalter v. New York*, 319 U.S. 427 (1943).

In the immediate situation, not only did the Liquor Control Commission fail to arrive at its decision according to the proscribed statutory manner but it also rendered its decision in such an arbitrary and capricious manner as to deprive petitioner of its right to due process of law, having unreasonably applied these proper legislative proscriptions.

It has been contended by respondent that petitioner does not possess such a property right as to be protected by these constitutional guaranties yet the State of Ohio, by enacting the aforementioned legislation, recognizes a liquor permit as of such importance as to warrant these guaranties. This is only just and equitable considering the financial loss one would be subjected to if deprived of its liquor permit which, in most instances, including the present one, is its sole asset, in an unreasonable and capricious fashion.

Even if not seen to be a property right, it is generally recognized that the Ohio Liquor Control Commission cannot exercise its power in an arbitrary and capricious manner in depriving petitioner of its permit. 45 AM. JUR. 2d, *Intoxicating Liquors*, Sec. 189 (1969); *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947).

Even if Mr. Krumholtz's vote merely be declared invalid for failing to be based upon a full review of the rec-

ord as required by law, the votes of the remaining two Commission members were divided, Chairman Thomas voting for affirmance of the Director's order and Vice Chairman Tablack voting for reversal. Ohio Revised Code Section 4301.04 refers to such a situation:

> The liquor control commission has the following powers which it may exercise by the vote of a *majority* of the commissioners:
>
> (A) To suspend, revoke and cancel permits . . .
> (Emphasis added.)

Since a majority of the Commission did not vote for revocation, as required by Revised Code Section 4301.04, the order delivered by the Commission is, again, not in accordance with law as required by Revised Code Section 119.12 and deprived petitioner of due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.

II. THE COURT OF APPEALS ERRED IN ITS AFFIRMANCE AS THE ORDER OF THE LIQUOR CONTROL COMMISSION WAS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AS TO ITS ERRONEOUS CONCLUSIONS THAT THE PETITIONER IS NOT A PROPER PERSON TO BE THE HOLDER OF ANY TYPE OF LICENSE ISSUED BY THE DEPARTMENT OF LIQUOR CONTROL AND THAT THE PETITIONER HAS A GENERAL DISREGARD FOR LAW AND ORDER.

The Liquor Control Commission, in its order rejecting petitioner's application for renewal of its liquor permits, found that petitioner showed a manifest disregard for law and order and was a proper person to hold a permit (See

Appendix at p. A21). A perusal of the record will disclose that there is no reliable, probative and substantial evidence to support this finding as required by Ohio Revised Code Section 119.12, rendering the decision so arbitrary and capricious as to deprive petitioner of due process of law as guaranteed by the Fourteenth Amendment to the U. S. Constitution.

An objective and just analysis of the petitioner's manner of conducting its business at 23 South Main Street should begin by reviewing the facts in chronological order.

The petitioner's employee, Gene Thomas, has been in the liquor business for sixteen years. Prior to the present litigation, Mr. Thomas has had an exemplary record without an arrest or citation to blemish it.

The petitioner, G.E.M. Corporation, was issued its permits on March 22, 1972, pursuant to an application for a transfer from the former permit holder. At that time, there was no objection to such by any state or local governmental agency. On October 13, 1972, the petitioner was notified by letter that the Director of the Department of Liquor Control had issued an order denying the petitioner's renewal application for the year 1972.

The petitioner is rightfully only to be held accountable for its conduct during the period immediately preceding the application for renewal, in this case the 206 days in which petitioner was actually the holder of the permit before the renewal determination. *Appeal of Mendlowitz*, 9 Ohio App. 2d 83, 222 N.E.2d 835 (1967).

The transcript of the hearing, however, refers to the following events during the 206 day period that relate to the activities of Gene Thomas, employee of petitioner, none of which could reasonably lead to such an erroneous de-

termination of the Liquor Control Commission, upon which it based its revocation of petitioner's permits, that the petitioner is not a proper person to be the holder of any type of license and has a general disregard for law and order.

1. Referring to a conversation between Lt. George Mullins of the Akron Police Department and Mr. Thomas "in the latter part of May or June" when Lt. Mullins pointed out a "prostitute". Lt. Mullins testified as to Mr. Thomas' cooperation with the police: "He told me he did not want them in his place. He told her to leave after I pointed her out and told him that was a prostitute. He said he wanted to keep her out."

2. On August 15, 1972, Mr. Thomas and a number of other tavern owners in the downtown Akron area were requested to meet and did meet with representatives of the Akron Police Department and the Summit County Prosecutor's Office. Lt. Mullins testified that Gene Thomas told him at that meeting that "he would make a very honest constraint effort to follow your directions in doing whatever you suggest to him."

3. Mr. Thomas testified under oath that he has been in the tavern business fifteen years and that he had never been cited or arrested at any time during that period, including the 206 days he had operated the Cascade Lounge. Mr. Thomas further testified that he had expelled women at the request of the police on "three or four occasions". Moreover, he had telephoned the police "to have the girls move."

4. Officers Harry M. Duckman and Ronald Dagger of the Akron Police Department, who patrolled the

vicinity where petitioner's premises were located, testified that Gene Thomas has kept trouble out of petitioner's bar and "polices pretty well."

The finding upon which the Liquor Control Commission based its denial of renewal of petitioner's permits, that the petitioner is not the proper person to be the holder of any type of license and has a general disregard for law and order, was certainly not supported by reliable, probative and substantial evidence. Moreover, the order was so arbitrary, capricious and unreasonable as to deprive petitioner of its right to due process of law as guaranteed by the Fourteenth Amendment.

III. THE COURT OF APPEALS ERRED AS THE LIQUOR CONTROL COMMISSION MISALLOCATED THE BURDEN OF PROOF AND ADMITTED EVIDENCE OF PRIOR MISCONDUCT NOT ATTRIBUTABLE TO THE PETITIONER BUT TO A PRIOR PERMIT HOLDER AND EVIDENCE OF HEARSAY STATEMENTS, DEPRIVING THE PETITIONER OF ITS RIGHT TO CROSS-EXAMINE THE DECLARANT.

Reviewing the instant proceedings, it is apparent that, although the Liquor Control Commission's regulations pay homage to the Ohio Civil Rules of Evidence, the following regulation was not followed at the January 17, 1973 hearing:

> In all hearings before the Commission and the determination thereof, the production of evidence shall be governed in general by the *rules of evidence and burden of proof* required by Ohio courts in civil cases. Regulation LCc-1-65, Section IV, Ohio Liquor Control Commision.

Such error not only caused this decision to not be rendered in accordance with law as required by state statute but also caused such to be rendered in such an unreasonable, arbitrary and capricious manner as to be violative of the due process clause of the Fourteenth Amendment of the U. S. Constitution. *Glicker v. Michigan Liquor Control Commission,* 160 F.2d 96 (1947).

The Liquor Control Commission, through its Chairman, Mr. Thomas, committed prejudicial error by misallocating the burden of proof in the January 17, 1973 hearing when he stated:

> What is the issue in the appeal: *The issue is the burden on the Police Department,* not the truth itself, the burden on the police, *the statute says the burden is on the Police Department.*

The Commission's own Regulation LCc-1-65, provides for the proper procedure in a hearing before the Liquor Control Comimssion:

> Section V: In all hearings before the Commission the burden of proof in all cases shall rest upon the Director of the Department.

The direction of a burden of proof on the Akron Police Department, while a member of that police department was testifying before the Commission, corrupts and erodes the very role that a non-party witness traditionally plays in an impartial hearing. The correct procedure should have been to treat the police officers as non-party witnesses—with no other objective than truth and justice.

Further, the Liquor Control Commission's order based its decision on improperly admitted, irrelevant evidence of prior alleged misconduct not attributable to the petitioner.

In *Appeal of Mendlowitz,* 9 Ohio App. 2d 83, 222 N.E.2d 835 (1967), guidelines were set forth limiting the Liquor Control Commission's review of occurrences that did not happen within the year preceding the annual renewal, the court stating ". . . having granted a renewal, the department cannot use prior misconduct as a 'Sword of Damocles' over the permit holder and his investment." 222 N.E.2d at 835.

The transcript, however, is replete with the following testimony as to events not even attributable to petitioner which were alleged to have occurred prior to March 22, 1972 when petitioner was granted said permit:

1. Detective James Mesanco of the Akron Police Department testified as to an arrest that occurred more than a year prior to the date of the hearing, three months prior to the time petitioner took control of the Cascade Lounge.
2. Detective Mesanco testified as to an alleged solicitation for prostitution case that occurred "just maybe about two doors away," in January of 1972, again three months prior to petitioner's taking control of the Cascade Lounge.
3. Detective Mesanco further testified as to the alleged entrance into the Cascade Lounge of alleged prostitutes prior to the assumption of control over the premises by the petitioner.

An order based on such irrelevant and highly prejudicial evidence can only be deemed to be so arbitrary and capricious as to violate due process of law.

Additionally, the transcript of the hearing is replete with hearsay testimony, admitted and considered by the Commission over the frequent and timely objections of the petitioner's counsel.

The testimony of Sergeant Forest P. Marks of the Akron Police Department contained the following hearsay:

Q. What girls were involved.

A. This girl named Barbara Davis, I believe her name was, July 29.

Q. Was her picture in there?

A. No, she wasn't.

Q. Where was she arrested?

A. She was arrested outside of the Cascade and she solicited a police officer inside.

Mr. Chuparkoff: I object to what she did inside, please, your Honor, he has no personal knowledge of that.

The statement of Sergeant Marks clearly falls within the traditional definition of hearsay, to-wit:

> . . . hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. E. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, Section 246.

The witness testified as to a statement made by another officer that this other officer had been solicited inside the bar. The credibility of this "other" officer is in doubt, for he was not present at the hearing. Additionally, the statement offers an arrest as proof of the commission of a crime, in itself inadmissible, the issue not being decided in a prior trial where a judgment on the merits has been rendered. E. CLEARY, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, Section 246.

The State of Ohio has itself recognized the prejudicial effect of hearsay at such proceedings as this. *Eastern Ohio Distributing Co. v. Board of Liquor Control of Ohio*, 98 N.E.2d 330 (Ct. App., Franklin County, 1950); *Mallett v. Board of Liquor Control*, 121 N.E.2d 129 (1953).

The admission of such prejudicial remarks did not, however, end with Sergeant Marks' statement, the transcript being replete with instances in which hearsay evidence was admitted over the objection of petitioner's counsel.

In every instance when such hearsay statements are admitted, the petitioner has lost several procedural safeguards that affect the credibility and trustworthiness of the absent declarant: The absent declarant did not make the statement under *oath;* the declarant did not make the statement in the presence of the trier of fact; and, most importantly, the petitioner loses the fundamental right to conduct a cross-examination of the declarant.

As was stated in *Hornsby v. Allen*, 326 F.2d 605 (U.S. Ct. App. 1964), since the granting or denial of liquor permits consists of a determination of factual issues and the application of legal criteria to them, the fundamental requirements of due process are applicable. The proceedings must amount to a fair hearing and there must be available the opportunity to cross-examine adverse witnesses. In this situation, such safeguards were certainly disregarded, depriving petitioner of its right to due process of law.

Further, the Commission admitted police arrest reports into evidence over the objection of petitioner's counsel. These reports contain hearsay statements and conclusions by the investigating officer based on what he was told by extrajudicial declarants and not by what he, himself, had observed.

Despite further objection, investigator's reports were also admitted into evidence by a police officer who did not personally write the reports or make the investigation contained therein. For such past recollection recorded to be admissible, the person who prepared the writing or one who read it at a time close to the occurrence of the event recorded need testify as to its accuracy. 3 J. WIGMORE, *Evidence in Trial at Common Law*, Section 738 (1970).

The police officer who offered such into evidence lacked any personal familiarity with these reports other than being the custodian of these and thousands of other such reports.

When all of the foregoing errors are considered, it is apparent that the Liquor Control Commission failed to follow the mandates of Ohio Revised Code Section 119.12, that its order be based upon "reliable, probative and substantial" evidence and be rendered "in accordance with law". Further, its decision was rendered in such an unreasonable, unjust, arbitrary, capricious and discriminatory manner as to deprive the petitioner of due process of law as guaranteed by the Fourteenth Amendment to the U. S. Constitution.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari be issued as petitioned herein.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION FOR REHEARING

(Dated April 23, 1976)

No. 76-95

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

G. E. M. CORPORATION, d.b.a.
GENE THOMAS CASCADE LOUNGE,
Appellant,

vs.

LIQUOR CONTROL COMMISSION,
Appellee.

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated March 12, 1976)

No. 76-95

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

G E M CORPORATION, d.b.a.
GENE THOMAS CASCADE LOUNGE,
Appellant,

vs.

LIQUOR CONTROL COMMISSION,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR
SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY RECORD

(Dated March 12, 1976)

No. 76-95

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

G E M CORPORATION, d.b.a.
GENE THOMAS CASCADE LOUNGE,
Appellant,

vs.

LIQUOR CONTROL COMMISSION,
Appellee.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR SUMMIT COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS

(Dated November 26, 1975)

C. A. No. 7821

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) ss:
SUMMIT COUNTY)

G.E.M. CORPORATION, dba GENE THOMAS' CASCADE LOUNGE, etc.
Appellant,

vs.

BOARD OF LIQUOR CONTROL OF THE STATE OF OHIO,
Appellee.

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO CASE No. 73 2 242

DECISION AND JOURNAL ENTRY

This cause was heard October 20, 1975, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. Each assignment of error was reviewed by the court and the following disposition made:

VICTOR, *P.J.*

This appeal, pursuant to R.C. 119.12, is from a judgment of the Court of Common Pleas upholding the order of the Ohio Liquor Commission which had affirmed the order of the Director of the Department of Liquor Control who had refused to renew the plaintiff's class D-5 and D-6 liquor permits on October 13, 1972.

A hearing was held on January 17, 1973, and was attended by two of the three members of the Liquor Commission. It was held in accordance with R.C. Chapter 119 and Rule LCc-1-65 of the Liquor Control Commission. Several police officers testified under oath. In sum, their testimony established that during the renewal period as many as 13 to 18 known prostitutes were observed either in or about the vicinity of the Cascade Lounge; that the officers had been solicited on more than one occasion both inside and outside the premises; and that more than one prostitute had been arrested for solicitation inside the premises. The Commission also allowed the introduction of official records of the Akron Police Department of eleven complaints from August 25, 1972, to December 30, 1972, wherein police officers were dispatched to the premises.

Essentially, the reasons for the rejection were the frequenting of the premises by known and convicted prostitutes, the number of arrests made on the premises for prostitution, and the number of assaults and other crimes occurring on the premises. The Commission further found that the applicant manifested a general disregard for law and order and, hence, was not a proper person to hold a liquor permit.

R.C. 4303.271 provides that the holder of a permit shall be entitled to a renewal thereof unless rejected by the Department for "good cause." The Liquor Control Act does not define "good cause."

Rule LCc-1-12 provides, in pertinent part:

> "In determining whether to grant or refuse a permit, the Department shall consider environmental factors affecting the maintenance of public decency, sobriety and good order * * *."

Thus, if the Commission finds that the renewal of the permit would result in substantial prejudice to public decency, sobriety and good order, it may refuse to grant a renewal provided there is sufficient reliable, probative and substantial evidence to sustain the finding. Under such circumstances, the refusal is for "good cause." Proceedings before the Commission are civil in nature and the burden of proof resting upon the Commission is proof by a preponderance of the evidence. *Sanders v. Fleckner,* 59 Ohio L. Abs. 135.

A review of this record convinces us that the environmental conditions existing on the permit premises and in the immediate vicinity thereof during the renewal period are such that the public decency, sobriety and good order are adversely affected to such an extent that the Commission was warranted in refusing to renew the permit. Unless the assignments of error urged by the appellant, G.E.M. Corporation, are well taken, the judgment must be affirmed. These assignments are:

> "I. The lower court erred in affirming the Order of the Ohio Liquor Control Commission, which was not rendered in accordance with law, depriving the appellant of due process of law as guaranteed by the Fourteenth Amendment of The United States Constitution, since that order was issued in the absence of a review of the certified testimony by one of the three commissioners, a full review required by statute of all the commissioners of the evidence and testimony.

> "II. The lower court erred in its affirmance inasmuch as the order of the Ohio Liquor Control Commission was not supported by reliable, probative and substantial evidence and was not rendered in accordance with law as required by statute, depriving the appellant of due process of law as guaranteed by the Fourteenth Amendment of The United States Constitution.
>
> "III. The Court of Common Pleas erred by considering evidence, admitted by the Liquor Control Commission over timely objection by appellant, of hearsay statements of a declarant that were neither made under oath, nor made in the presence of the Commission, thus depriving the appellant of his right to cross-examine the declarant and the right to due process of law as required by The United States Constitution.
>
> "IV. The Court of Common Pleas erred in affirming the order of the Liquor Control Commission since that order was not supported by reliable, probative and substantial evidence as to its erroneous conclusion that the Appellant is not a proper person to be the holder of any type of license issued by the Department of Liquor Control and the erroneous conclusion that the Appellant has a general disregard for law and order, violating Appellant's Fourteenth Amendment due process rights.
>
> "V. The Court of Common Pleas erred in its affirmation, since the Board of Liquor Control Commission committed prejudicial error by misallocating the burden of proof that properly rests on the Director of the Department, thus depriving the appellant of due process of law, guaranteed by the Fourteenth Amendment of The United States Constitution.

"VI. The Court of Common Pleas erred in affirming the Board of Liquor Control Commission's Order since that order was not supported by reliable, probative and substantial evidence and was not rendered in accordance with law, as the Board admitted evidence of prior misconduct not attributable to the appellant, but to a prior permit holder, and in addition to that, remained silent at the time of the original application for transfer by the appellant, causing the order to be unduly arbitrary and in violation of the due process clause of the Fourteenth Amendment.

"VII. The order of the Liquor Control Commission, as affirmed, deprived the G.E.M. Corporation, a legal entity of the State of Ohio, of due process of law in contravention of the Fourteenth Amendment of The United States Constitution, in that it revoked the corporation's liquor permit based on the prejudicial admission of testimony as to one employee's alleged acts."

Assignment of Error No. I

This assignment is without merit.

Only two of the three commissioners attended the January 17 meeting. However, it is agreed that all three need not be present for any particular hearing. See, R.C. 4301.04(G). Hence, it is apparent that when the full Commission reviews the record of the hearing and the decision is made by the Commission as a whole, the order rendered is proper. This order is signed by the one commissioner who was present and the one who was absent; the third dissented. Substantial credible and reliable evidence is lacking that the absent commissioner had not reviewed the

record. Under such circumstances, the actions of an administrative agency are presumed to be valid, made in good faith, and in the exercise of sound judgment. *Wheeling Steel v. Evatt*, 143 Ohio St. 71 (1944).

Assignment of Error No. II

This assignment is without merit. The record discloses ample, reliable, probative and substantial evidence to deny the renewal of the permit.

Plaintiff further contends, under this assignment, that the admission of evidence concerning events before G.E.M. took over was error. We disagree. However, assuming arguendo that it was, it was harmless. Such evidence merely disclosed that conditions during the renewal period were no different than those existing prior thereto.

In addition, appellant says that the Commission placed the burden of proof on the Akron Police Department. Of course, this was not incorrect as the burden of proof is on the Department. See, Rule LCc-1-65 §V. However, this in no way prejudiced plaintiff. That the Commission aligned the burden of the objecting party (the police) with that of the Director cannot prejudice appellant. No burden of proof was shifted to plaintiff. The record discloses sufficient evidence establishing that the Department's burden has been met.

Appellant contends that the appellee failed to conduct the hearing in accordance with the proper rules of evidence.

Commission Rule LCc-1-65 §V provides:

"In all hearings before the Commission and the determination thereof the production of evidence shall be governed in general by the rules of evidence and burden of proof required by Ohio Courts in civil cases."

While this rule does not open the flood gates to hearsay, neither does it prohibit such testimony for whatever probative value it may have. Thus, it has been held that official records of a police department are admissible in such a hearing, as they reflect the amount of police supervision of the permit premises. See, *Milenkovich v. Dept. of Liquor Control*, 110 Ohio App. 122 (1959), MCO 1/13/60.

Assignment of Error No. III

We reject this asignment of error. It relates to the admission of hearsay testimony concerning the arrest of prostitutes by officers who were not solicited but assisted in the arrest and testified to the same. This testimony was used merely to establish that an arrest had been made, not to establish the truth of the statement. It was properly admitted. The propriety of the admission of arrest records has been discussed under Assignment of Error II.

Assignment of Error No. IV

This assignment of error is well taken. Nevertheless, it does not require a reversal of the judgment. Where environmental conditions relating to the public decency require a rejection of a renewal, a rejection is proper "regardless of the permit holder's personal fitness or satisfactory business operations." *In Re Appeal of Mendlowitz*, 9 Ohio App. 2d 83 (1967).

Assignment of Error No. V

We have discussed this assignment in II above and rejected it. We reject it here.

Assignment of Error No. VI

We reject this asignment of error.

Pursuant to R.C. 4303.292(B)(1)(a), the Department of Liquor Control "may" refuse to transfer a permit where it is disclosed that its location will substantially interfere with public decency. However, there is no mandate that transfer shall be refused. The record is barren of any evidence that any objection to the transfer was made by anyone. Further, it is conceivable, if the Department knew of the conditions prior to the transfer, that it anticipated a change of management might result in improved environmental conditions. Nevertheless, the Department and the Commission cannot be estopped from performing the duties required of them under the Liquor Control Act when an objection is made to the renewal of a liquor permit.

Assignment of Error No. VII

This final assignment of error is without merit.

We have already determined that there is insufficient evidence to show that either G.E.M. Corp., or its sole stockholder, Gene Thomas, are unfit to own a liquor permit. Nevertheless, where the environmental conditions relating to the public decency require a rejection of renewal, the personal fitness of the permit holder's fitness is not an issue.

We would like to suggest, however, that since the real applicant for the renewal was a corporate entity and much time has elapsed since the original decision by the Court of Common Pleas, the Director would be justified in making a further review and investigation of the premises to ascertain whether conditions have improved over those existing in 1972.

Considering the issue before us, we conclude no prejudicial error occurred in rejecting the request for a review of the liquor permit and, accordingly, we affirm the judgment.

Judgment affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Costs taxed to appellant.

Exceptions.

/s/ WILLIAM H. VICTOR
Presiding Judge for the Court

MAHONEY, J. and BRENNEMAN, J. concur.

FINDING OF THE COURT OF COMMON PLEAS

(Filed October 26, 1973)

Case No. 73 2 242

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

G.E.M. CORPORATION dba GENE THOMAS CASCADE LOUNGE,
Appellant,

vs.

LIQUOR CONTROL COMMISSION OF THE STATE OF OHIO,
Appellee.

FINDING

HARVEY, J.: (By Assignment)

This cause is before the Court upon the appeal from the administrative board, to-wit, the Ohio Liquor Control Commission pursuant to the provisions of the Revised Code 119.12. This is an appeal from the Order of the Ohio Liquor Control Commission upholding an Order of the Ohio Department of Liquor Control in its refusal to renew appellant's class D 5 and D 6 liquor permit.

On October 13, 1972 the Director of the Department of Liquor Control denied an application for renewal of the license.

Attached to the transcript of the testimony in this case is the Order appealed from.

This was an order heretofore made by the Director which was affirmed. There was a finding made rejecting for good cause shown the renewal of the license upon the following grounds: The Akron Police Department rejects to the renewal of the captioned permit on the following grounds: A. The captioned permit premises is a hang-out for prostitutes and other undesirable characters.

B. The large number of arrests made on the permit premises for prostitution.

C. The numerous assaults and other crimes which occur on permit premises.

It is the law that the evidence required by Revised Code 119.12 to support an order of an administrative agency on appeal therefrom to the Courts must be reliable, probative and substantial evidence and in accordance with law. These are not conjunctive provisions.

The language has been interpreted to mean 1. Reliable, that is dependable with reasonable assurance of its probability as not only truthful but also true.

2. Probative relates to the evidentiary value of the testimony and other evidence in an analytical sense having depth and being more than merely superficial or speculative.

3. Substantial would be that the evidence has body or substance of sufficient degree to be of some weight as well as dependable and trustworthy.

There is a burden upon the part of the Commission to show cause why the renewal of the license should not be granted. But when an applicant is not given the right to renewal in all events, in the face of evidence showing good cause for refusal.

There was substantial and probative evidence to the effect that this place had become a haven for prostitutes. That numerous prostitutes had been arrested and some convicted and some jumped their bond after arrest.

There was evidence that women went out of the place of business with men and came back without them. There was evidence that there have been many police calls with reference to disturbances or other confusion at the place and these police calls have been recorded and have been answered and this place has become a burden to the police as far as that area on Main Street is concerned.

It is the duty of the Director of Liquor Control who is charged with regulating the liquor business to see that these licensees conduct such business and live up to the regulations and standards required by the department and require licensees to support the maintenance of public decency, sobriety and good order in the conduct of such business.

In the determination of whether or not a liquor permit should be renewed the Director of Liquor Control may consider the records of the police department relating to arrests and to police calls made at the liquor permit premises. *Department of Liquor Control v. Milenkovich*, 83 O.L.A. 929.

The Court must make a decision in this case from the transcript of the evidence together with the exhibits which have been received as a part of this transcript.

The Court has examined the transcript and also the exhibits and have examined the briefs of both parties.

It is the finding of this Court that there has been reliable dependable and probative evidence and substantial evidence of a sufficient degree to be of some weight as

well as dependable and trustworthy and that the finding of the Commission is in accordance with law. From this evidence that is received which is of such a nature it can hardly be said that it is not reliable and of a substantial nature. It would seem that there was a showing of harm and prejudice to the public decency, sobriety and good order and therefore there was sufficient good cause to reject this license under the provisions of Revised Code 4303.271.

The Court is of the opinion that the hearing presented before the Commission was of sufficient weight and credibility to justify the rejection of such permit and constitutes a good cause to reject the renewal application which is the issue here.

The phrase good cause is somewhat vague but as was pointed out in the case of *Buckeye Bar, Inc. v. Liquor Control Commission* in the recent case 32 O.Aps. 2d 89. The Court of Appeals of Franklin County in such case said that the Department Regulation 12 seemed to suggest that the concept of "Good Cause" embraces the situation where "no substantial prejudice to public decency, sobriety or good order will result". If the Department finds such a condition to exist a permit will issue. To the contrary a permit will not issue.

So, the right of the appellant herein to continue to sell intoxicating liquor must yield to the more basic right of the public acting through the Department of Liquor Control to eliminate a condition which prejudices public decency, sobriety and good order.

It is the claim of the licensee that the hearing held before the Commission was had before Mr. Kenneth E. Thomas, Chairman of the Board and Mr. George Tablack,

member of the Board and that at no time during the hearing was Mr. Fred Krumholtz present to participate in the appeal hearing.

Revised Code 4301.04 under the subject of Powers of the Commission provides in subdivision G that for the purpose of any hearing or investigation which are respectively authorized or required by such Chapters to conduct the Liquor Control Commission or any member thereof, the Director or any agent of the Department designated in writing for that purpose may administer oaths, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records and documents and *testimony*.

In accordance with the order it would appear that all three Commissioners reviewed the evidence before any decision was made. To do so and to take testimony as required would seem to imply a stenographic record or a tape recording of this testimony and there is no evidence to contradict the fact that there was a tape recording or other means used to preserve the testimony for a review by all three commissioners.

Revised Code 4301.04 further provides that no vacancy in the Commission shall impair the right of the remaining commissioners to exercise all powers of the commission.

The act of the majority of the commission when in session is the act of the commission.

We therefore find that there has been no error in the procedure not only in making the order but in the appeal in this case. It should be remembered in a case of this kind that there is no inherent right to engage in the sale of intoxicating liquors. That the business is a tolerated business. That all one gets is a license which is review-

able each year and there is therefore no property right in such a business. Since it is a tolerated business and since it could be prohibited absolutely by the sovereign power it therefore follows that the prescribed conditions and regulations which are not unreasonable and which observe the policy of confining the liquor traffic in order to minimize its evils are justified. *Ziffrin v. Reeves*, 308 U.S. 132.

So the evidence as reviewed by this Court is sufficient to support the conclusion of the Department and the Liquor Control Commission and justified a conclusion that the evidence was reliable, probative and substantial and in accordance with law. The judgment of the Liquor Control Commission is affirmed.

SUPPLEMENTAL FINDING OF THE COURT OF COMMON PLEAS

Case No. 73 2 242

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

G.E.M. CORPORATION dba Gene Thomas Cascade Lounge,
Appellant,

vs.

LIQUOR CONTROL COMMISSION,
Appellee.

The appeal to the Common Pleas Court was completed on October 26, 1973, and the transcript of the testimony was filed that date. The case was assigned to the Judge for hearing and decision in November 1973. The Court at that time examined the transcript of the testimony, the exhibits and the briefs of Counsel and wrote a finding which affirmed the Liquor Board. This was in November 1973.

The Trial Judge who heard this case under special assignment after the decision, was out of the state until the following Spring. When he returned there was a motion pending, filed by Attorney Musi ano, for a separate finding of law and fact.

A hearing was called at which the Attorney General's Office was present and the Court requested that Attorney

Musitano withdraw his motion and the Court would review again the testimony and the briefs in this case. Mr. Musitano consented.

The Court, on reexamining the evidence, finds according to the testimony of Mr. Thomas, the G.E.M. Corporation became the operators of the Thomas Cascade Lounge March 22, 1972. The exhibits show that prostitutes were arrested in this place of business or in the vicinity thereof, May 8, May 30, June 7, July 19, August 1, November 2 and June 13, 1972.

The record also shows arrests for fights, disorderly conduct and in some cases, physical injuries occurred on the premises. There was also some alleged pickpocketing in the place according to customers who claimed loss. The pickpocketing happened in December of 1972.

Since the real applicant for a license was a corporate entity and a great deal of time has elapsed since the original decision of this Court, the Director would be justified in reviewing the record of the place since November 1973. The Court has no way of knowing what changes have taken place in this place of business. However the real applicant for the license was the corporate entity and not Mr. Thomas personally.

Reviewing again the testimony, the exhibits and the briefs, the Court reaffirms the finding and decision made in the Fall of 1973. In other words the Liquor Board is affirmed. The Court order will apply only to the G.E.M. Corporation, the applicant.

DECISION OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF OHIO

(Dated January 17, 1973)

BEFORE THE LIQUOR CONTROL COMMISSION

STATE OF OHIO

Docket No. 2215
Case No. 73A-72
January 17, 1973

IN THE MATTER OF THE APPEAL OF—

G.E.M. Corporation
dba Gene Thomas' Cascade Lounge
(formerly Eli's Cascade Lounge)
23 South Main Street
Akron, Ohio 44308

FROM AN ORDER REJECTING AN APPLICATION FOR RENEWAL OF CLASSES D-5 AND D-6 PERMITS

This cause coming on for hearing on an appeal of G.E.M. Corporation, dba Gene Thomas' Cascade Lounge (formerly Eli's Cascade Lounge), 23 South Main Street, Akron, Ohio 44308, was submitted to the Liquor Control Commission on the evidence, and on consideration thereof said Commission finds that the local authorities having the primary responsibility for the enforcement of law and order in the community objected to the reissuance of the subject permits and that the objections offered thereto were reasonable and well-founded. The Commission further finds from the evidence that the appellant is not a proper person to be the holder of any type of license issued by the Department of Liquor Control, in view of the

manner in which the permit business had been operated in the past and as evidenced by the number of arrests made upon the permit premises and indicative of appellant's general disregard for law and order, and that by reason thereof the appellant is not entitled to the reissuance of the Classes D-5 and D-6 permits and that the application filed therefor should be denied.

It is therefore ordered that the within appeal be, and the same hereby is, dismissed, effective January 31, 1973.

Liquor Control Commission—State of Ohio

Kenneth E. Thomas—Chairman

Fred J. Krumholtz—Member

Vice Chairman G. D. Tablack—Dissents (Director of Liquor Control reversed)

Mailed: 1/24/73

LM